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February 14, 2003

Via Electronic Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., Room TWB-204
Washington, D.C. 20554

Re: UNE Triennial Review, CC Docket Nos. 01-338, 96-98, 98-147
Ex Parte Notification

Dear Ms. Dortch:

Yesterday, the undersigned, along with Steve Augustino of Kelley Drye & Warren LLP, representing SNiP LiNK, and Ed Cadieux of NuVox, met with Jeff Carlisle, Rich Lerner, Brent Olson, and Jeremy Miller, of the Wireline Competition Bureau, to discuss the parties' positions with respect to access to EELs and, in particular, the joint SBC/NuVox/Cbeyond/SNiP LiNK proposal on EELs.[1]

During the meeting, the parties outlined the benefits of the joint EELs proposal and responded to numerous questions from staff regarding the proposal. Notably, the parties underscored that the proposed streamlined safe harbor criteria for smaller carriers creates a test that applies on a LATA-wide, as opposed to circuit specific, basis.[2] The parties noted that this

[1] Cbeyond Communications, NuVox, Inc., SNiP LiNK, LLC, SBC Telecommunications, Inc. , 2/7/03 Joint *Ex Parte* Letter, CC Docket No. 01-338.

[2] The parties underscored that the one-to-twenty-four interconnection trunk to EEL ratio in the test is not designed to measure and monitor local and non-local traffic on an EEL circuit-by-EEL circuit basis, but instead provides an indicator that the CLEC is exchanging a significant amount of local traffic with the ILEC in the LATA, in part through the use of EELs. In response to questioning regarding assertions from Verizon equating the proposed ratio criterion to a 4% local traffic test, the parties explained that Verizon's assertion exhibits a fundamental misunderstanding and mischaracterization of the ratio test. The parties, joined by Cbeyond, responded separately to Verizon's February 12 *Ex Parte* in a joint *ex parte* filed on February 13, 2003. NuVox, SNiP LiNK, Cbeyond, 2/13/03 Joint *Ex Parte* Letter, CC Docket No. 01-338.

feature of the streamlined test eliminated the measurement and monitoring burdens associated with demonstrating compliance with existing safe harbor options 2 and 3. The parties also emphasized that the streamlined test eliminated potential policing concerns that the ILECs have created based on each of the current safe harbors. Significantly, the parties explained that the streamlined test would allow them to serve and grow with their customers by not only permitting provision of an integrated T1 product over an EEL but also by allowing the use of such EELs to provide a full T1 of broadband Internet access over EELs (provided that traffic patterns LATA wide generate sufficient interconnection trunk needs and that the particular EEL falls within the ratio incorporated into the test to ensure compliance with the significant local use standard). The parties emphasized that they expect their integrated T1 service customers to continue to generate the need for additional T1 services, including broadband Internet access, and that they would be substantially impaired if they were unable to continue to use EELs for that purpose.

Critically, the parties also underscored that the streamlined safe harbors require ILECs to provide EELs to smaller CLECs in an audit-free environment. Under the streamlined test, an ILEC must provision first and then file a complaint at the FCC, if it disputes a CLEC's compliance with any of the three criteria. For NuVox in particular, this aspect of the proposal is especially important.[3] To expedite such complaint proceedings, of which there should be relatively few, the proposal clearly states that a CLEC has an obligation to produce appropriate documentation demonstrating compliance with the three criteria.

The parties also indicated that the proposal fully conforms with, and would help achieve the purposes of, the Regulatory Flexibility Act. The Regulatory Flexibility Act of 1980, as amended ("RFA"),[4] requires the Commission to consider the impact of its rules upon small entities, and to reflect that consideration in both an Initial Regulatory Flexibility Analysis and a Final Regulatory Flexibility Analysis.[5] The RFA imposes no separate notice obligation. Rather, compliance with the RFA is achieved by providing adequate Initial and Final Regulatory Flexibility Analyses.

In the *Triennial Review NPRM*, the Commission sought comment on whether the Commission's safe harbor provisions are effectively tailoring access to EEL combinations to those requesting carriers seeking to provide "significant local usage" to their end users.[6] In the *NPRM*, the Commission also put small businesses and smaller carriers on notice that it might

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[3] NuVox also underscored the need for Commission action to put a prompt and decisive end to BellSouth's EEL audit abuses.

[4] 5 U.S.C. § 601 *et seq.*

[5] Notably, the proposal asks the Commission to ease regulatory burdens imposed on "smaller carriers" that are not similarly situated to larger carriers that have greater resources to dedicate to satisfying such burdens and who present a more substantial risk given, among other things, their high amount of toll revenues and higher level of use of special access to facilitate the delivery of interexchange services.

[6] *Triennial Review NPRM* ¶ 71.

modify its rules pertaining to EELs, and that small businesses and carriers might be impacted by such rule changes.[7] Indeed, in the IRFA set forth in the *Triennial Review NPRM*, the Commission explicitly delineated the scope of the potential rule changes that might affect small businesses and smaller carriers.[8] The Commission stated that it would conduct a "comprehensive examination" of UNEs and "incorporate[] the records of several ongoing proceedings involving UNE rules."[9] The Commission further stated that it would consider whether UNE rules should vary by "type of service, facility, geography or other factors."[10] Since an EEL is combination of UNEs, the Commission's statement that it would conduct a "comprehensive examination" of UNEs put small businesses and carriers on notice that it might modify EELs rules.

Moreover, the Commission specifically identified each category of small entities that might be impacted by its proposed rules. For example, the Commission stated that all small businesses in each of the following categories, among others, might be affected by its proposed rule changes: local exchange carriers, interexchange carriers, and competitive access providers.[11]

The Commission also sought comment on alternatives to its proposed rules that might minimize the impact of the proposed rules on small entities. For example, recognizing that the size of the entity as a subscriber is an important factor in the unbundling analysis, the Commission specifically sought comment on whether UNEs should differ based on the type of customer served by the requesting carrier.[12] Notably, the Commission also sought comment on the potential economic impact that the proposed rules might have on smaller carriers, particularly in light of the potential additional administrative burdens of such rules.[13]

In short, the RFA's requirements are procedural, and, as discussed above, the Commission satisfied its obligation to make a "reasonable, good-faith effort to carry out [the Regulatory Flexibility Act's] mandate"[14] through the IRFA. As the Ninth Circuit recently held, "[l]ike the Notice and Comment process required in administrative rulemaking by the APA, the analyses required by RFA are essentially procedural hurdles; *after considering the relevant*

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7 *Id.* ¶¶ 88-129.
8 *Id.* ¶¶ 127, 129.
9 *Id.* ¶¶ 89, 90.
10 *Id.* ¶ 90.
11 *Id.* ¶¶ 98-100.
12 *Id.* ¶ 128.
13 *Id.* ¶ 129.
14 *United States Cellular Corp. v. FCC*, 254 F.3d 78, 88 (D.C. Cir. 2001) *citing Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 625 (5th Cir. 2000).

impacts and alternatives, an administrative agency remains free to regulate as it sees fit."[15] As part of the Initial Regulatory Flexibility Analysis, the Commission noted that one alternative consideration may include the simplification of compliance requirements under a rule for small entities and small carriers.[16] And that is what we propose. Under the joint proposal, the Commission would apply the same "significant local use" requirement to all carriers but would relax, for smaller CLECs, the evidentiary burdens of demonstrating compliance with that standard. The Commission, in its Final Regulatory Flexibility Analysis, would be able to cite adoption of this proposal as one of "the steps . . . taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes."[17] Thus, the Commission's adoption of this proposal would comply with, and further the goals of, the RFA.

During the meeting, the parties also provided background with respect to basis for the ratio included in the streamlined test. The parties explained that the ratio contained in the streamlined test is a well designed proxy to determine whether a CLEC uses EELs to support the exchange of a significant amount of local traffic on a LATA-wide basis with the ILEC. Like current safe harbor option 1, it does not contain, constitute or reflect a specific percentage of local traffic per circuit or number of local lines *per circuit* requirement. The parties explained that the ratio has its roots in the general engineering principle that for every 5 local access lines, a CLEC needs 1 DS0 interconnection trunk. Thus, a CLEC will need one DS0 interconnection trunk for every DS1 EEL in service, or one DS1 interconnection trunk for every 24 DS1 EELs. Using both loops and EELs to generate the need for interconnection trunks, a smaller CLEC gains flexibility to use EELs as it wishes (including integrated T1 products and all data products), while providing the ILEC with assurance that the smaller CLEC's EELs are being used to contribute to the exchange of a significant amount of local traffic on a LATA-wide basis.

The parties also responded to questions about Qwest's latest proposed test (Qwest, Feb. 6, 2003 *Ex Parte*) and noted that like all others proposed by Qwest, the latest test was more onerous than the current Safe Harbors and, in particular, that the 51% measurement requirement was without any legal or policy justification. The parties also objected to nearly every aspect of Qwest's proposal as being one that requires that local voice traffic be carried on every circuit, despite Qwest's having no corresponding obligation of its own and the fact that the current safe harbor option 1 contains no such requirement.[18] The parties opposed Qwest's suggested "Class

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[15] *Environmental Defense Center, Inc. v. United States Envtl. Protection Agency*, 2003 WL 113486, 38 (9th Cir.) (emphasis added).

[16] *Triennial Review NPRM* ¶ 127, 129.

[17] 5 U.S.C. § 604(5).

[18] The parties have consistently advocated and, now Qwest appears to agree, that co-mingling restrictions must be eliminated. Notably, there are no co-mingling restrictions included in the streamlined safe harbors incorporated into the joint proposal.

5" switch requirement[19] as well as the proposed treatment of an ISP as an IXC, as it would prevent the use of EELs for data or Internet access.[20] In addition, the parties expressed significant concerns that Qwest's proposals were at odds with common engineering and provisioning processes and that they would present the ILECs with ample opportunity to use the disconnect to avoid provisioning of EELs in the future. The parties also noted that Qwest was simply wrong with respect to Internet access traffic. Under the current safe harbors, Internet access can and does satisfy the local use criteria.[21] Finally, the parties objected to Qwest's proposal to expand ILEC audit rights and impose more measurement, recording and policing burdens on CLECs in doing so. The parties indicated that Qwest's proposal would only give ILECs greater ability to use audits as a means of discouraging legitimate use of EELs.

Finally, the parties also underscored that the "status quo" was unacceptable because the status quo essentially amounts to continued unchecked ILEC expansion and abuse of the current safe harbors. The parties noted that ILECs had recently begun to seek to apply the current safe harbor restrictions to "new EELs", although the current state of the law is that they apply only to conversions. BellSouth's unlawful extension of co-mingling restrictions to stand-alone UNEs also was highlighted. And, especially significant to NuVox, the parties noted that BellSouth's abuse of its limited audit rights could not continue unchecked.

Pursuant to Section 1.1206 of the Commission's rules, this *ex parte* notification is being submitted to the Office of the Secretary electronically. Please associate this letter with the record in the proceedings indicated above.

Respectfully submitted,

John J. Heitmann

JJH/cpa

cc: Christopher Libertelli
Matthew Brill
Jordan Goldstein
Dan Gonzalez
Lisa Zaina
Jeff Carlisle
Brent Olson
Jeremy Miller
Rich Lerner
Qualex International

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[19] The parties do not oppose a requirement that an EEL cannot be connected to a Class4-only long distance voice switch.

[20] The treatment of an ISP as IXC also would unfairly penalize those CLECs that have made the necessary investments to become an ISP, as well as a CLEC.

[21] *Supplemental Order Clarification*, 15 FCC Rcd 9587, 9598-9600, n. 64 (June 2, 2000).